IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 17, 2006 Session

# KENNETH W. NEELEY v. PIEDMONT NATURAL GAS CO., INC., d/b/a NASHVILLE GAS

**Appeal from the Circuit Court for Davidson County**
**No. 04C-2077 Walter C. Kurtz, Judge**

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**No. M2005-02446-COA-R3-CV - Filed on February 15, 2007**

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Plaintiff appeals the trial court's grant of summary judgment to the defendant in this negligence action. Because the plaintiff failed to present any evidence to establish duty of care or breach of a duty, we affirm the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN, and FRANK G. CLEMENT, JR., JJ., joined.

G. Christopher Holder, Murfreesboro, Tennessee, for the appellant, Kenneth W. Neeley.

William B. Jakes, III, Nashville, Tennessee, for the appellee, Piedmont Natural Gas Company, d/b/a Nashville Gas.

## MEMORANDUM OPINION[1]

On February 17, 2004, a fire destroyed a rental house owned by Kenneth Neeley. The house had been without gas service since March of the previous year. A new tenant arranged for Nashville Gas to turn on the natural gas to the house and its gas appliances. Four days before the fire, a Nashville Gas employee, Mike Bracey, went to the home to turn on gas service, which included turning on service to gas appliances.

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[1] Tenn. R. Ct. App. 10 states:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

The fireplace at the rental house had gas logs, and Mr. Neeley and former tenants had used the gas logs without problem for nine years. Part of Mr. Bracey's assignment was to turn on the gas to those logs. Mr. Bracey had been trained in appropriate code requirements and company policies related to turning on gas service in residences. Service technicians such as Mr. Bracey are to inspect the area of operation of any gas appliance to determine if the appliance is in a safe operating location.

Mr. Bracey examined the chimney to make sure there were no obstructions. He ascertained it was clear. He also observed the surrounding area of the interior of the chimney and did not notice any cracked or missing bricks or missing mortar. To Mr. Bracey, the chimney appeared to be safe and workable, and it did not appear to present any unusual fire hazard.

After the fire, the Nashville Fire Department determined that the fire originated behind the gas log insert in the fireplace. Further, the Department's report stated, "Fire radiated through cracks in brick enclosure extending to back of wall and floor of adjacent bedroom, igniting wood studs and floor deck, cloths and other combustible materials on floor in area of origin."

The plaintiff's expert, David Wright, a fire investigator with Engineering Investigation, conducted an on-site inspection, which included removing baseboard and the gas logs. He opined that "the deterioration of the fireplace construction permitted heat to exit the fireplace cavity and impinge the paperback drywall in the wall section resulting in ignition and loss. . . . It is reasonable to conclude that Nashville Gas personnel should have inspected the fireplace construction as part of the initial testing and startup procedure. The deterioration in the rear of the fireplace would have been easily visible **with removal of the gas logs**. Recognition of this deterioration would have resulted in a refusal to connect service and prevented the loss." (emphasis added).

Mr. Neeley filed suit against Piedmont Natural Gas Company, Inc., d/b/a Nashville Gas for property damage caused by the fire alleging that Nashville Gas's inspection before re-connecting gas service to the house was negligent. The trial court granted Nashville Gas's summary judgment, dismissing the complaint. In its final order, the trial court found:

> Specifically, the Court finds that there is no evidence in the record that there was any missing brick or mortar at the time Nashville Gas reconnected service to the dwelling in question. There is also no evidence in the record that if, in fact, there was any missing mortar or brick at the time service was reconnected, it was visible to Nashville Gas personnel. There is also no evidence in the record that the inspection of the fireplace and chimney performed by the Nashville Gas employee at the time service was reconnected was inadequate or that the inspection deviated from any applicable standard, if any such standard exists. The evidence is also undisputed that for approximately nine years before the fire, the plaintiff and all of his rental tenants had used the gas logs in question with absolutely no problems or complaints.

On appeal, Mr. Neeley argues that Nashville Gas employees were trained to inspect the area where gas appliances were to be used and to deny service if dangers were present. He also argues that reasonable minds could differ on whether any negligence on his part equaled or exceeded that of Nashville Gas employees. On the other side, Nashville Gas argues that the trial court correctly concluded there was no evidence in the record to establish the required elements of a negligence claim and, therefore, no dispute of material fact that would preclude summary judgment for the defendant.

## I. STANDARD OF REVIEW

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Draper v. Westerfield*, 181 S.W.3d 283, 288 (Tenn. 2005); *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003); *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 284 (Tenn. 2001); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). We review the summary judgment decision as a question of law. *Finister v. Humboldt Gen. Hosp., Inc.*, 970 S.W.2d 435, 437 (Tenn.1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997). Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Staples v. CBL & Assoc.*, 15 S.W.3d 83, 88 (Tenn. 2000)

The requirements for the grant of summary judgment are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn.2002); *Blair*, 130 S.W.3d at 764; *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). Consequently, summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion - that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Draper*, 181 S.W.3d at 288; *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001); *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 66 (Tenn. 2001); *Staples*, 15 S.W.3d at 88.

In our review, we must consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, and we must afford that party all reasonable inferences. *Draper*, 181 S.W.3d at 288; *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 507 (Tenn. 2001). We must determine first whether factual disputes exist and, if so, whether the disputed fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd*, 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). "If there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied." *Byrd*, 847 S.W.2d at 211.

To meet the requirements for summary judgment, a party moving for summary judgment must, in its filings supporting the motion, either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. *Blair*, 130 S.W.3d at 767; *Staples*, 105 S.W.3d at 88-89. If the moving party fails to meet this burden, the burden to come forward with probative evidence establishing the existence of a genuine issue for trial does not shift to the non-moving party and the motion must be denied. *Staples*, 105 S.W.3d at 88-89.

If, however, the moving party successfully negates a claimed basis for the action or establishes an affirmative defense, the non-moving party may not simply rest upon the pleadings. *Staples*, 15 S.W.3d at 88-89. In that situation, the nonmoving party has the burden of pointing out, rehabilitating, or providing new evidence to create a factual dispute as to the material element in dispute. *Staples*, 15 S.W.3d at 88-89; *Rains v. Bend of the River*, 124 S.W.3d 580, 587-88 (Tenn. Ct. App. 2003). Thus, if, but only if, the moving party presents evidence sufficient to justify grant of the motion if the facts remain uncontested, the nonmoving party is required to come forward with probative evidence which makes it necessary to resolve a factual dispute at trial. *Blair*, 130 S.W.3d at 767. A nonmoving party who fails to carry that burden faces summary dismissal of the challenged claim.

## II. REQUIREMENTS FOR A NEGLIGENCE ACTION

In order to bring a successful suit based on a claim of negligence, the plaintiff must establish:

(1) a duty of care owed by the defendant to the plaintiff;
(2) conduct falling below the applicable standard of care amounting to a breach of that duty;
(3) an injury or loss;
(4) causation in fact; and
(5) proximate, or legal cause.

*Draper*, 181 S.W.3d at 290; *Hale v. Ostrow*, 166 S.W.3d 713, 716 (Tenn. 2005); *Biscan v. Brown*, 160 S.W.3d 462, 478 (Tenn. 2005); *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993), *citing McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991). Duty, the first element of the claim, is the legal obligation a defendant owes to a plaintiff to conform to the reasonable person standard of care in order to protect against unreasonable risks of harm. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995). Whether a defendant owes a duty to a plaintiff in any given situation is a question of law for the court. *Draper*, 181 S.W.3d at 290; *Ostrow*, 166 S.W.3d at 716; *Bradshaw*, 854 S.W.2d at 869.

The question of whether a particular defendant owes a duty of care to a particular plaintiff is to be answered by balancing the foreseeability and gravity of the potential harm against the feasibility and availability of alternatives that would have prevented the harm. *Ostrow*, 166 S.W.3d at 716; *Coln v. City of Savannah*, 966 S.W.2d 34, 39 (Tenn. 1998). In that balancing, the foreseeability prong is paramount. *Ostrow*, 166 S.W.3d at 716-17; *Biscan*, 160 S.W.3d at 480.

In general, all persons have a broad duty to exercise reasonable care to avoid causing foreseeable injury to others. *Doe v. Linder Constr.*, 845 S.W.2d 173, 178 (Tenn. 1992). However, as a general rule, a person does not have an affirmative duty to act for the protection of a third party. One exception to that general rule is where the defendant "stands in some special relationship to either the person who is the source of the danger or to the person who is foreseeably at risk from the danger." *Draper*, 181 S.W.3d at 291, *citing Turner v. Jordan*, 957 S.W.2d 815, 818 (Tenn. 1997). Another exception exists where a person voluntarily assumes a duty of care, in which case, "'[o]ne who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully.'" *Draper*, 181 S.W.3d at 291, *quoting Biscan*, 160 S.W.3d at 482-83, *quoting Stewart v. State*, 33 S.W.3d 785, 793 (Tenn. 2000)).

In the case before us, Mr. Neeley's primary claim is that the Nashville Gas employee's inspection prior to turning on gas service was negligent. Thus, whether he alleges that Nashville Gas had a duty to inspect for dangerous conditions or that it assumed that duty, the plaintiff's argument is that the inspector did not use reasonable care in the inspection.

The trial court found that Mr. Neeley had offered no proof that any missing brick or mortar in the fireplace was visible. While Mr. Neeley's expert testified that the deterioration in the fireplace would have been visible, that statement was qualified by "with removal of the gas logs." The trial court also found there was no evidence the inspection was inadequate or deviated from any applicable standard of care. In other words, there was no evidence that the Nashville Gas employee was required, in order to perform a reasonably careful inspection, to remove the gas logs which had been in place and in use for a number of years. We agree.

Accordingly, we affirm the trial court's grant of summary judgment to Nashville Gas because Mr. Neeley failed to present evidence to create a dispute of material fact as to the essential elements of negligence in response to Nashville Gas's evidence that the inspection was reasonable under the circumstances.

Costs on appeal are taxed to the appellant, Kenneth W. Neeley,

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PATRICIA J. COTTRELL, JUDGE